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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

A. J. ARAVE, WARDEN,

Petitioner,

vs.

THOMAS E. CREECH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is Idaho's statutory aggravating factor which authorizes the death penalty for murders committed with utter disregard for human life unconstitutionally vague because the limiting construction of this factor announced by the Idaho Supreme Court does not require that the factor be defined with reference to the occurrence of specifically defined acts?

2. May a United States Court of Appeals vacate a death sentence by interpreting a state statute to require a sentencing judge to make an express finding of the existence of particular factual components of a statutory aggravating circumstance?

3. When a death sentence is vacated by a state appeals court to correct a procedural defect of state law, does the Constitution require that sentencing proceedings be reopened to receive evidence of a prisoner's post-sentencing conduct in prison?

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PETITION FOR WRIT OF CERTIORARI

Arvon J. Arave, Warden of the Idaho State Maximum Security Prison, petitions for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, which granted federal habeas corpus relief to a prisoner sentenced to death on grounds that (1) a statutory aggravating factor which is part of the Idaho death penalty statutes is unconstitutionally vague and was not interpreted by the Idaho Supreme Court in sufficiently narrow fashion, (2) the sentencing judge did not make a subsidiary fact finding thought by the court of appeals to be necessary to a finding of two aggravating factors and (3) when, during state appellate proceedings, the defendant's case was remanded by the Idaho Supreme Court for the correction of a state statutory defect, having no

implications in federal law, Creech was not given a second sentencing hearing.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991). A copy of the opinion is appended to this petition.

JURISDICTION

The opinion of the court of appeals was first filed March 27, 1991, and amended on October 16, 1991. The court of appeals, also on October 16, 1991, denied petitioner Arave's petition for rehearing and suggestion for rehearing en banc, Judges Trott, Kozinski and T. G. Nelson, dissenting. Both the court of appeals and a justice of this court have denied petitioner's applications for a stays of mandate pending the disposition of this petition.

This case arose under 28 USC § 2254 and petitioner invokes the jurisdiction conferred on this court by 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the Constitution of the United States, provides in pertinent part:

> " . . . nor cruel and unusual punishment inflicted."

Title 28, § 2254(a), United States Code, provides, in pertinent part:

> [A] circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Idaho Code § 19-2515 provides, in pertinent part:

> (c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.
>
> (d) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the

opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

(e) Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

(f) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(g) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

. . .

(6) By the murder, or circumstances surrounding its commission, the defendant exhibits utter disregard for human life.

(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e) or (f), and it was

accompanied with the specific intent to cause the death of a human being.

Idaho Code § 18-4003 provides in pertinent part:

(c) Any murder committed by a person under a sentence for murder of the first or second degree, including such persons on parole or probation from such sentence, shall be murder of the first degree.

. . .

(e) Any murder committed by a person incarcerated in a penal institution upon a person employed by the penal institution, another inmate of the penal institution or a visitor to the penal institution shall be murder of the first degree.

Idaho Code § 19-2827 (c) provides as follows:

(c) With regard to the sentence the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.

STATEMENT OF THE CASE

On May 13, 1981, Thomas Creech was an inmate in an Idaho penal institution where he was serving sentences for two first degree murders. On that day, Creech murdered David Jensen, a physically handicapped inmate,[1] who had been imprisoned for a non-violent crime, by kicking and beating him to death with a sock filled with dry-cell batteries. See *State v. Creech*, 670 P.2d 463 (Idaho 1983). On a plea of guilty, Creech was convicted and sentenced to death for killing Jensen. *Id.* The conviction and sentence were upheld on review by the Supreme Court of Idaho. *Id.* Creech's petition to this Court for a writ of certiorari was denied. *Creech v. Idaho*, 465 U.S. 1051 (1984).

The Jensen killing led to Creech's fifth conviction for first degree murder. Creech has variously admitted to having committed from 26 to 40 murders, State Supreme Court Transcript, Vol.II, pp.244-246, eleven of which were verified by law enforcement officials, State Supreme Court Transcript, Vol.II, p.146.

Although Creech gave several different versions of the Jensen murder, including one that contained elements of self-defense and sudden rage, there was evidence that Creech himself induced the nearly-helpless Jensen to attack him in order to create the pretext for a deadly

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[1] Sometime prior to his incarceration, Jensen suffered a gunshot wound to the head which left him with brain damage, partial paralysis and a protective plate over a portion of his skull. State Supreme Court Transcript, Vol.II, pp.197-199.

response. At his sentencing hearing, Creech testified as follows:

> CREECH: Two different people come [sic] to me and asked me to kill David Jensen for money and one said he would help me escape from the penitentiary if I would kill him.
>
> I even told David about this, but he still thought that – I am not sure what. He wanted to impress me. He wanted to be a part of these gangs and he accepted these.
>
> And a lot of people wouldn't accept him because he was partially crippled and they thought he was nobody.
>
> On the morning that the murder happened, I was responsible for giving the weapons to someone else and they give [sic] them to David. It wasn't – I tried to tell him after the first part of the incident happened, that just to leave it be, to walk away from it and I thought it was over with.
>
> He went and he took a shower and come back to his cell, and I watched the guy hand him the knife, and he locked in his cell and I asked him not to come out because if he did I would have to kill him.
>
> But to impress those people, he come [sic] out anyway and I killed him.
>
> State Supreme Court Tr., Vol.II, pp.246-247.

Creech, at this own insistence, pled guilty over his counsel's objection and with the knowledge that he would likely be sentenced to death. See *State v. Creech*, 710 P.2d 502 (Idaho 1985). Creech later sought to withdraw his guilty plea, asserting that he had misled the court in order to get his plea accepted.

The sentencing judge found as aggravating factors, among others, that the murder had been committed with utter disregard for human life, Idaho Code § 19-2515(g)(6), that the murder was committed by a person already under a sentence for murder, Idaho Code § 19-2515(g)(7) and that the murder was committed against another prison inmate. Idaho Code § 19-2515(g)(7).

On direct review of the death sentence, Creech complained that although the state district court had conducted a full sentencing hearing it had denied him the right to be present at a critical stage of the proceedings by publishing the sentencing decision in writing rather than bringing Creech before the court for oral pronouncement of sentence. The Idaho Supreme Court deferred action on the direct appeal and returned the case to the district court, ordering that it comply with Idaho Code § 19-2503, which requires that defendant be present for sentencing. *Creech*, 670 P.2d at 466, n.1. During this time, the state supreme court *retained jurisdiction* of the case pending compliance with the remand order. R., State Supreme Court, Vol.5, p.9. Its order told the district judge that he was, "in the presence of the defendant and his counsel," to "enter a judgment of conviction and impose such sentence . . . as to the said District Judge may appear to be just and appropriate." *Id.* This was to be accomplished within fourteen days of the date of the order. *Id.*

When the case came before the sentencing judge on the temporary remand order, Creech's counsel moved for a second full sentencing hearing, which was denied because Judge Newhouse thought it was beyond the scope of the remand order.

After being denied relief in the state courts, Creech filed a petition for a writ of habeas corpus in the United States District Court for the District of Idaho. Relief was denied and in 1986 Creech appealed to the Ninth Circuit Court of Appeals. Almost two years later, in April of 1988, the case was argued. Three years after that the court of appeals decided the case. On October 16, 1991, the court filed an amended opinion and denied the warden's request for rehearing and suggestion for rehearing *en banc*.

The court ordered that Creech be granted *habeas* relief on the following grounds: (1) Idaho's statutory aggravating factor which authorizes the death penalty for first degree murders committed with "utter disregard for human life" is, in the court's view, too vague to allow for principled distinction between capital murders and others, (2) the Idaho Supreme Court's construction limiting the applicability of this factor is not sufficient, (3) although the Idaho sentencing court found that the murder was aggravated by two statutory factors related to Creech's inmate status, the sentencer did not expressly state that he found facts that would support the aggravating factors and (4) the state courts were required to grant Creech a second sentencing hearing when, during the pendency of his appeal from the sentence of death, the Idaho Supreme Court temporarily remanded the case to allow the district court to correct a statutory sentencing error.

In a dissent from the court's denial of a rehearing *en banc*, Judge Trott, joined by Judges Kozinski and T. G. Nelson, argued that the panel which decided Creech's appeal "misapplied the holding of the Supreme Court in

Walton v. Arizona, 110 S.Ct. 3047, 3057 (1990), in such a way as to bring about one application of the *Walton* test for Arizona, and a different application of the same test for Idaho." *Creech v. Arave*, slip op., p.14356, App., p.43. Specifically, the dissenting judges concluded that the Idaho Supreme Court's decision in *State v. Osborn*, 631 P.2d 187 (Idaho 1981), not only gives "*some* guidance" in the application of the "utter disregard" factor, "it gives substantive guidance." *Creech v. Arave*, slip. op., p. 14358, App., p.45.

This petition is taken from the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals for the Ninth Circuit, for the reasons stated below, is inconsistent with this court's precedent and raises questions of general importance for the administration of death penalty statutes.

I

The Court of Appeals Holding Which Invalidated Idaho's "Utter Disregard" Aggravating Factor Is Inconsistent With This Court's Precedent In That It Misapplies Walton v. Arizona And Fails To Accord A Presumption Of Correctness To State Factual Findings

One of Idaho's statutory aggravating factors empowers the sentencing judge to impose the death penalty when, by a first degree murder "or the circumstances surrounding its commission, the defendant exhibits utter

disregard for human life." Idaho Code § 19-2515(g)(6). The Idaho Supreme Court applied a limiting construction to this statutory provision in *State v. Osborn*, 631 P.2d 187 (Idaho 1981). As the court construed section 19-2515(g)(6), it is to be applied to "acts or circumstances surrounding the crime which exhibit the highest, utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *Osborn*, 631 P.2d at 201. By concluding that this factor does not overlap other aggravating factors, the Idaho court held that the "utter disregard" factor is not proved merely by showing the presence of some other factor, such as multiple murder, or an especially heinous murder. *Id.*

The Idaho Court's resort to descriptive terms like utmost callousness, pitilessness and cold-bloodedness, some of which were suggested to the Idaho Court by *Profitt v. Florida*, 428 U.S. 242, 255 (1976), refers the sentencing judge to words of common meaning and understanding. By this process, the "utter disregard" factor singles out killings that are not the product of significant emotional distress or provocation. Section 19-2515(g)(6) was thus made to apply at least to those killings which are the product of a desire to kill solely for the pleasure derived from murder by persons like Creech.

Although the sentencing judge somewhat confusingly observed that the murder "evidenced an excessive violent rage,"[2] he appears to have been describing the frenzied and brutal nature of the attack rather than Creech's motivation for the crime. See, Part II *infra*. The

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[2] The court of appeals concluded that Judge Newhouse's comment was inconsistent with his "utter disregard finding."

judge also stated that "the murder, once commenced, appears to have been an intentional calculated act." In his statement of reasons for imposing the death penalty, Judge Newhouse described Creech as an habitual killer who could not be deterred by anything less than the death penalty.

The Idaho Supreme Court is required by Idaho Code § 19-2827(c) to review the evidentiary support for sentencing findings, see *Osborn, supra,* and it must be assumed that the court found as a matter of fact that the murder was a calculated and cold-blooded act in accordance with the evidence to that effect. Cf. *Cabana v. Bullock,* 474 U.S. 376 (1986) (whether the sentencer or a state reviewing court makes the requisite finding of culpability is not an issue for a federal habeas court. A state supreme court's conclusion as to the factual correctness of a finding of culpability is entitled to a presumption of correctness). Instead of according the presumption of correctness to the state court's decisions, the court of appeals concluded that the factual findings of the Idaho court did not demonstrate that Creech was a cold-blooded, pitiless killer and that this illustrated the vagueness of the *Osborn* limiting construction.

Not only does the court of appeals' decision improperly intrude upon the fact-finding functions of state courts, it also misapplies *Walton v. Arizona,* 110 S.Ct. 3047 (1990), by requiring the state to engage in exercises of statutory definition that this Court has not demanded. *Walton* holds that a state definition of vague terms is constitutionally sufficient if it provides *some,* though not mathematically precise, guidance to the sentencing authority. Thus, Arizona's "especially heinous" factor

was found to be sufficiently limited by definitions that equated "cruelty" with mental anguish, "heinousness" with torture or physical abuse, and "depravity" with indifference to suffering. Most of these terms relate to subjective states of mind on the defendant's part and are not objectively distinguishable from the defining terms used by the Idaho Supreme Court in *Osborn*.

The Court of Appeals' view of what *Walton* means adds a requirement for the identification of objectively determinable "specific acts," which would require the state to limit the applicability of its aggravating factor by a catalog of specific incidents of the defendant's behavior. The court's holding makes it nearly impossible to rely on any element of subjectivity in the definition of aggravating factors.

This Court has not imposed such restrictions on a state's right to define the cases to which the death penalty will apply, nor have other courts. In *People v. Lucas,* 548 N.E.2d 1003 (Ill. 1989), the Supreme Court of Illinois, distinguishing *Maynard v. Cartwright,* 486 U.S. 356 (1988), held that the term "especially brutal or heinous, indicative of wanton cruelty" was sufficiently narrow because the term "especially brutal or heinous" was modified by the requirement for a showing of "wanton cruelty." See also, *People v. Odle,* 538 N.E.2d 428 (Ill. 1988). Subjective definitions of similar character are common in states with death penalty statutes. See, e.g., *Smalley v. State,* 546 So.2d 720 (Fla. 1989) ("utter indifference to suffering" to define "cruelty"); *Brown v. State,* 565 So.2d 304 (Fla. 1990) ("cold, calculated and premeditated"); *State v. Fullwood,* 373 S.E.2d 518 (N.C. 1988) ("conscienceless, pitiless, unnecessarily torturous.")

The opinion below threatens to open a new chapter in death penalty litigation in which the dominant theme will be that state courts must define all potentially subjective terms with lists of specific acts. The Court of Appeals comes close to requiring that state courts reach mathematical precision in defining the reach of aggravating factors. The principle announced by the Court of Appeals raises an issue of general importance which should be addressed by this Court.

II

A United States Court Of Appeals May Not Properly Vacate A Death Sentence By Interpreting A State Statute To Require A Sentencing Judge To Make An Express Finding Of The Existence Of Particular Factual Components Of A Statutory Aggravating Circumstance

Idaho law authorizes the death penalty for First Degree Murder committed by a prison inmate who is serving sentences for first degree murder and for the first degree murder of a fellow prison inmate. In each such case the state must show, as a prerequisite to the death penalty, that the murder was one of the first degree and that the murder was accompanied by the specific intent to cause death. Idaho Code, § 19-2515(g)(7).

Without citing any principle of federal law, the Court of Appeals held that the sentencer's failure to make an express finding of specific intent was an omission that entitled Creech to federal habeas relief. The court concluded that although there was evidence of specific intent upon which the sentencing judge could have relied, his findings "fail to indicate that he found specific intent

beyond a reasonable doubt before applying Section § 19-2515(g)(7)." Slip. op., p.14341, App., p.25.

Implicitly, the court's holding was that the sentencer must not only make specified findings in connection with § 19-2515, but that these findings must follow a particular format. In his formal written judgment, the sentencing judge set forth his findings of statutory aggravating factors by identifying each factor upon which he relied. In relevant part, the findings read as follows:

> 6. Statutory Aggravating Circumstances Found Under Section 19-2515(f), Idaho Code
>
> * * *
>
> C. The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code Subsection (c). The defendant was under a sentence for Murder of the First Degree at the time of his actions.
>
> D. The murder was one defined as Murder of the First Degree by Section 18-4003, Idaho Code, subsection e. The defendant committed the murder on a fellow inmate while both were incarcerated in the Idaho State Correctional Institution.
>
> Findings of the Court In Considering the Death Penalty, etc., State Supreme Court Record, Vol.3, p.57.

In the circumstances of this case, Idaho Code § 19-2515 does in deed predicate the death penalty on evidence that a murder by an inmate already serving a sentence for first degree murder or the murder of a fellow

inmate was accomplished with specific intent to kill. The action of the state sentencing judge in finding the existence of these two aggravating factors would seem to indicate that the judge had found all the requisite supporting facts, including specific intent to kill. That is especially so in light of the Court's holding in *Walton v. Arizona*, 111 L.Ed.2d 511 (1990) that while it is essential that *jurors* be *instructed* in all facets of the sentencing process, this logic "has no place in the context of sentencing by a trial judge." *Walton*, 11 L.Ed.2d at 425. "Trial judges are presumed to know the law and to apply it in making their decisions." *Id.* In departing from this principle, the Court of Appeals also departed from its own law. In *Knaubert v. Goldsmith*, 791 F.2d 722 (9th Cir. 1986), the court held that not every fact supporting a state court finding "need be stated on the record in infinite detail and clarity. In certain circumstances we will recognize that factual determination is implicit in the actions taken by a state court." 791 F.2d at 727. Accordingly, the court held that it would assume that a state judge found facts necessary to support a ruling on a suppression motion. Cf. *People v. Lucas*, 548 N.E.2d 1003 (Ill. 1989) (Death sentences are reviewed on entire record with the object of determining whether aggravating factors have been proved.); *State v. Osborn, supra*. The same principle should have been applied in Creech's case. A sentencing judge's finding that a statutory aggravating factor is present necessarily implies that the state courts have found all the factual components of that factor to the requisite degree of proof.

The Court of appeals should have taken the position that the trial court's finding was entitled to a presumption of correctness because it necessarily included a

finding that Creech acted with specific intent (if one assumes that the trial judge read the statute, *Walton, supra*). Such a factual determination must be presumed correct. 23 USC § 2254(d). "A habeas court may not disregard this presumption unless it expressly finds that one of the enumerated exceptions to § 2254(d) is met and explains the reasoning in support of that conclusion." *Burden v. Zant*, 112 L.Ed.2d 962, 968 (1991). See also, *Demosthenes v. Baal*, 109 L.Ed.2d 762 (1990). As in *Burden*, the Court of Appeals gave no explanation of why it chose to disregard the presumption.[3]

The result is especially peculiar because the sentencing judge stated expressly that he believed Creech had intended to kill the victim, David Jensen. After finding that the statutory aggravating factors had been proven, the sentencing judge, in a section of his findings entitled "Reasons Why Death Penalty Was Imposed" the judge entered a finding in these terms: "This defendant intentionally destroyed another human being at a time when he was completely helpless." Findings, State Supreme Court Record, p.58. In the section of the court's findings entitled "Facts and Arguments found in Aggravation," the judge found "that the victim, once the attack commenced, was under the complete domination and control

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[3] We know of no authoritative basis to conclude that the presumption of § 2254(d) applies differently to express factual findings and those implicit in a sentencing court's conclusion that the state had made the factual showing necessary to sustain the finding of a statutory aggravating circumstance. If the Court of Appeals relied on such authority, it did not cite it.

of the defendant. The murder itself was extremely gruesome evidencing an excessive violent rage. With the victim's attack as an excuse, the defendant's murder then took on many of the aspects of an assassination." Findings, State Supreme Court Record, p.56.

The Eighth Amendment does not compel the conclusion of the Court of Appeals. The Court held in *Cabana v. Bullock*, 474 U.S. 376 (1986), that "the Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund* [v. Florida, 458 U.S. 782] for such punishment. If a person sentenced to death *in fact killed*, attempted to kill, or intended to kill, the Eighth Amendment is not violated by his or her execution . . . . " 474 U.S. at 386. Thus, even a murder committed in the course of a robbery could constitutionally result in a death penalty if the robber was the actual killer, as the California Supreme Court held in *People v. Anderson*, 742 P.2d 1306 (Cal. 1987).

The Court of Appeals, however, has held that notwithstanding Creech's status as the actual killer of another inmate, the Idaho statutory provision conditioning the death penalty on an additional finding of specific intent requires the sentencer, in addition to finding the aggravating factor, to also make express findings as to its components. The Idaho statute does not require this, nor does the Constitution.

Although a trial jury must be instructed that it must find every element of a crime according to the required standard of proof, *Cabana*, litigatory attempts to convert enhancement components into elements of crime have failed, see Walton, *supra*. The principle of Walton that the

Enmund finding need not be the subject of proof as an element of the offense, and therefore submitted for express consideration by a jury, is no different in character than that a sentencing judge need not explain that by finding the presence of an aggravating factor, he has also found the presence of all its component parts.

The decision below should be reviewed because the court's weakening of the presumption of correctness has implications for all of the death penalty states of the Ninth Circuit as well as those in jurisdictions which may be encouraged to follow the court's example.

III

The Court of Appeals' Holding That A Remand During Appeal For The Purpose Of Correcting A Procedural Defect Entitled Creech To A New Sentencing Hearing Is Inconsistent With *Skipper v. South Carolina*, 476 U.S. 1 (1986)

While Creech's appeal was pending in the Idaho Supreme Court, the case was returned to the sentencing judge in order to insure that the sentence was pronounced in Creech's presence. This action was based solely on a state statute which requires the defendant's physical presence at sentencing. Idaho Code § 19-2503. Creech had a full sentencing hearing, at which he was present, but the sentencing judge thereafter issued his sentencing judgment in writing. Creech was not absent at any critical stage of the proceedings as tested by *Snyder v. Massachusetts*, 291 U.S. 99 (1934).

Skipper v. South Carolina, 476 U.S. 1 (1986) holds that a defendant facing a possible death sentence must be

allowed to present evidence of his conduct in jail while awaiting sentencing for whatever mitigating value it may have. The case cannot be fairly read to mean that a defendant is entitled to a new sentencing hearing when his case is returned to the sentencing judge for the correction of a mere procedural defect. The Idaho Supreme Court retained jurisdiction during this remand and required that Judge Newhouse comply with its order within fourteen days.

If these circumstances reopen a case for a new sentencing hearing, logical extension of the principle is that a capital defendant is forever entitled to periodic sentencing hearings to give him the opportunity to argue that his behavior in prison may persuade a sentencing judge to reduce his sentence. There could never be an execution if such a rule prevailed. *Skipper* stands only for the unexceptionable proposition that a defendant is entitled to present all mitigating factors at the time of his sentencing hearing.

The Idaho Supreme Court's decision in *Sivak v. State*, 731 P.2d 192 (Idaho 1986), which the court of Appeals found persuasive, relies on *Skipper* incorrectly. That fact should not lead to a rule which so seriously undermines the finality of judgments.

CONCLUSION

Petitioner Arave requests that a writ of certiorari issue and that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS E. CREECH, *Petitioner-Appellant,* v. A.J. ARAVE, Warden, Idaho State Penitentiary; AL MURPHY, Director, Idaho State Board of Corrections; JIM JONES, Attorney General, State of Idaho, *Respondents-Appellees.*	No. 86-3983 D.C. No. CV-86-1042-HLR ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Idaho
Harold J. Ryan, District Judge, Presiding

Argued and Submitted
April 6, 1988 – Seattle, Washington

Submission Deferred August 25, 1988
Resubmitted July 12, 1990
Filed March 27, 1991
Amended October 16, 1991

Before: Robert R. Beezer, Cynthia Holcomb Hall and Charles Wiggins, Circuit Judges.

Opinion by Judge Hall; Dissent by Judge Trott, with whom Judges Kozinski and T. G. Nelson, join.

SUMMARY

Constitutional Law

Affirming in part, reversing in part and remanding a district court denial of a petition for habeas relief, the court of appeals held that appellant was not denied effective assistance of counsel when he did not allow counsel to inform him of the elements of the offense of first degree murder or possible defenses before voluntarily changing his plea to that of not guilty.

Appellant Thomas E. Creech murdered a fellow inmate while incarcerated on other murder convictions. He pleaded guilty in state court to first degree murder and was sentenced to death. The district court denied Creech's petiton [sic] for habeas relief. Creech argued that he should be allowed to withdraw his guilty plea because he was denied effective assistance of counsel in that his attorney failed to provide him with certain information prior to the making of his guilty plea; that in the absence of such information, his plea was not "voluntary and intelligent" and therefore cannot be allowed to stand.

The assistance of counsel received by a defendant is relevant to the question of whether a defendant's guilty plea was knowing and intelligent insofar as it affects the defendant's knowledge and understanding. Although the Supreme Court has stated that ineffective assistance of counsel can apply to guilty pleas, most cases dealing with such challenges have involved attorney recommendations that the defendant plead guilty. Here, Creech claimed that his counsel failed adequately to discuss the elements

of the crime or possible defenses with him before he changed his plea from not guilty to guilty. However, his counsel had been allowed less than 15 minutes to attempt to change his client's mind, and had informed the state trial court that he believed Creech should continue to plead not guilty. The district court found as a matter of fact that counsel did not discuss with Creech the specific elements of the offense with which Creech was charged or possible defenses to these charges. Nevertheless, the district court found that counsel's performance throughout the state proceedings did not fall below an objective standard of reasonableness. However, any omission on counsel's part was not the result of his incompetence as counsel. Creech had simply not allowed his counsel to inform him of the elements of the offense or possible defenses. Counsel told Creech that his advice was to not change his plea, and that he needed more time. Nevertheless, Creech informed the state court that he wished to proceed and plead guilty. Creech could not now make the claim that he was unfairly deprived of the assistance of counsel.

The district court correctly rejected Creech's argument that his ignorance of the elements of first degree murder should invalidate his plea. That court found that Creech understood that malice or intent was an element of first degree murder at the time he pled guilty. The court found it inconceivable and not merely improbable that Creech would have gone to trial on a defense of imperfect self-defense, or that if he had done so he either would have been acquitted, or if convicted, would nevertheless have been given a shorter sentence than he

actually received. Even assuming his counsel's performance was not reasonable, the court believed Creech's ignorance of the possible defense of "imperfect self-defense" was harmless beyond a reasonable doubt. In addition, the court affirmed the district court's conclusion regarding Creech's competency to plead guilty. Creech failed to show that he was incompetent to plead guilty.

Creech's right to confrontation was not violated because he had the opportunity, other than through cross-examination, to dispute the accuracy of the presentence report prior to and at his sentencing hearing. His counsel had been given the report prior to the sentencing hearing.

Creech argued that although he was allowed to present any and all mitigating evidence at his initial sentencing hearing, because the Idaho Supreme Court voided that sentence and ordered resentencing, constitutionally he must be allowed another opportunity to do so. Like the Idaho Supreme Court, the Ninth Circuit saw no rational basis for distinguishing the evidence of a defendant's good conduct while awaiting trial and sentencing, and evidence of a defendant's good conduct pending review of a death sentence that is vacated on appeal. On this basis, the appellate court reversed and remanded with instructions to grant the petition for habeas relief. The writ shall order Creech's release if, within a reasonable time set by the district court, Idaho fails to vacate Creech's sentence and provide Creech with a resentencing hearing at which he can present any and all mitigating evidence that exists at the time of the hearing.

Creech claimed that the state trial court applied two aggravating circumstances without making a required

finding. The appellate court found that there was evidence by which the state court could have concluded that Creech had specific intent. At the time he pleaded guilty, Creech admitted that he intended to kill the victim. Nevertheless, that court's findings failed to indicate that the court found specific intent beyond a reasonable doubt before applying the statutory aggravating circumstance. On remand, the district court shall grant the petition ordering Creech's release if the state court at resentencing applies the aggravating circumstances under that statute without making a finding of specific intent. In addition, the court also concluded that the statutory aggravating circumstance that "the defendant exhibited utter disregard for human life" is unconstitutionally vague. The court also found the Idaho limiting construction of such statutory circumstance, as applied to Creech, to have been unconstitutionally vague. The court therefore reversed and remanded with instructions to grant the petition ordering Creech's release unless, within a reasonable time set by the district court, the Idaho court balances the remaining, constitutionally valid aggravating and mitigating factors to determine whether Creech should be sentenced to death.

Creech's argument that the Constitution guarantees a jury trial on the existence of aggravating circumstances that may result in the imposition of a sentence of death has been fully rejected by the Supreme Court. That court held that there is no sixth amendment right to jury sentencing, even where the sentence turns on specific findings of fact.

The court rejected Creech's claims that his case should be remanded to the district court because the

district court improperly limited its evidentiary hearing on his petition. Creech had a full and fair opportunity to present the relevant facts of his claims. His counsel had more than enough time between the affirmance of Creech's death sentence and the deadline for filing of post conviction challenges to prepare any post-conviction claims for relief. Creech was thus not entitled to an evidentiary hearing on this basis.

COUNSEL

Cliff Gardner, Fiedler & Gardner, San Francisco, California, for the petitioner-appellant.

Lynn E. Thomas, Solictor General for the State of Idaho, Boise, Idaho, for the respondents-appellees.

ORDER

The opinion filed on March 27, 1991 is hereby amended as follows:

In 928 F.2d at 1487, the following is deleted: "Creech has not pointed to any evidence to support his claim. The only 'evidence' purported to buttress his claim of incompetency contains to the record."

The following is inserted in lie thereof:

"Contrary to Creech's assertion, Dr. Heyrend did not conclude that Creech could not appreciate the consequences of decisions such as waiving legal rights. When asked, "Do you have any information or evidence to

indicate to your satisfaction that at the time of the defendant's plea in this case, that he did not intend to plead guilty or did not recognize the consequences of that legal act?," Dr. Heyrend replied, "I really have no information in that area." While Dr. Stoner was more supportive of Creech's position, even he admitted, "I think there's room to be more certain than I am in this case." Creech failed to show that he was incompetent to plead guilty."

In 928 F.2d at 1491, at the end of the third full paragraph, add the following footnote after the citation to *Osborn*, 631 P.2d at 201:

> "The Idaho Supreme Court also noted that,
>
> To properly define [the "utter disregard"] circumstance, it is important to note the other aggravating circumstances with which this provision overlaps. The second aggravating circumstance, I.C. § 19-2515 (f)(2), that the defendant committed another murder at the time this murder was committed, obviously could show an utter disregard for human life, as could the third aggravating circumstance, I.C. § 19-2515 (f)(4), that the murder was committed for remuneration. Since we will not presume that the legislative intent was to duplicate any already enumerated circumstance, thus making I.C. § 19-2515 (f)(6) mere surplusage . . . , we hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in I.C. §§ 19-2515 (f)(2), (3), and (4).

Rather than explaining what "utter disregard for human life" means, this passage merely recognizes that the legislature must have meant it to mean something other than the preexisting aggravating circumstances. Since none of

these aggravating circumstances are at issue, this language does not help us to determine the meaning of "utter disregard." "

In 928 F.2d at 1492, at the end of subsection C, the words ", as applied to Creech, to have been" are deleted and the word "is" is inserted in lieu thereof.

In 928 F.2d at 1492, the second paragraph of footnote 16 is deleted.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed R. App. P. 35.

With these amendments the petition for rehearing from the appellant and the petition for rehearing from the appellees are DENIED and both suggestions for rehearing en banc are REJECTED.

OPINION

HALL, Circuit Judge:

Petitioner Thomas E. Creech appeals from the district court's denial of his petition for a writ of habeas corpus. Creech is currently incarcerated at the Idaho State Correctional Institution ("ISCI") on the basis of three Idaho murder convictions. The conviction which gives rise to

this appeal is based on Creech's 1981 murder of David Jensen, a fellow inmate at ISCI. Creech pleaded guilty to first degree murder and was sentenced to death.

I

The facts and proceedings in this case are adequately described in opinions rendered by the Idaho Supreme Court after Creech's direct appeal, *State v. Creech*, 670 P.2d 463, 465-66 (Idaho 1983), *cert. denied*, 465 U.S. 1051 (1984) (*"Creech I"*), *and after his efforts to obtain post-conviction relief, State v. Creech*, 710 P.2d 502, 502-07 (Idaho 1985) (*"Creech II"*). Additional facts will be discussed where relevant to the issues we must decide in this appeal.

II

We review *de novo* the district court's denial of a petition for habeas corpus. *Carter v. McCarthy*, 806 F.2d 1373, 1375 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987). We review any factual findings made by the district court for clear error. *Hayes v. Kincheloe*, 784 F.2d 1434, 1436 (9th Cir. 1986), *cert. denied*, 484 U.S. 871 (1987).

III

Creech initially contends that he should be allowed to withdraw his guilty plea. This contention rests upon two arguments. First, Creech argues that he was denied effective assistance of counsel because his attorney failed to provide him with certain information prior to the making of his guilty plea. Second, Creech argues that in

the absence of such information, his plea was not "voluntary and intelligent" and therefore cannot be allowed to stand. We find these arguments differ merely in form, not in substance, *Evans v. Meyer*, 742 F.2d 371, 375 (7th Cir. 1984) and therefore we will discuss them together.

A guilty plea must represent "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). "The assistance of counsel received by a defendant is relevant to the question of whether a defendant's guilty plea was knowing and intelligent insofar as it affects the defendant's knowledge and understanding." *United States v. Frye*, 738 F.2d 196, 199 (7th Cir. 1984).

Although the Supreme Court has found that ineffective assistance of counsel can apply to guilty pleas, *Hill v. Lockhard*, 474 U.S. 52, 58 (1985), most cases that have dealt with such challenges have involved attorney recommendations that the defendant plead guilty. Here, however, Creech's attorney, Rolf Kehne, told the court in Creech's presence that he believed Creech should continue to plead not guilty. Creech himself acknowledged that "my attorney advised me not to plead." Thus, the alleged error is not that Kehne misled Creech by recommending the wrong plea, but that he failed to provide Creech with certain information. Specifically, Creech claims Kehne failed adequately to discuss the elements of the crime or possible defenses with him before he pleaded guilty.

To establish that he received ineffective assistance of counsel, Creech must show: (1) his attorney's representation fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the

defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In reviewing alleged deficiencies in representation, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

Creech pleaded not guilty at his initial arraignment on June 19, 1981 before Judge Newhouse of the Idaho state district court. On August 28, 1981, Judge Newhouse convened a plea hearing in response to a letter from Creech stating that he wished to plead guilty. Kehne stated by way of affidavit that he had "absolutely no advance notice" that Creech was going to change his plea, and he was allowed "less than fifteen minutes" to attempt to change his client's mind.

The district court found "as a matter of fact" that Kehne did not discuss with Creech the "specific elements of the offense with which he was charged or possible defenses to these charges." Nevertheless, the district court reviewed counsel's performance throughout the state court proceedings and held that "[Kehne's] representation did not fall below an objective standard of reasonableness."

To establish that Kehne's representation fell below an objective standard of reasonableness, Creech must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 687. In support of his claim that Kehne's failure to inform him of the elements of the crime and possible defenses were omissions which fell below this standard, Creech relies on *Brown v. Butler*, 811 F.2d 938 (5th Cir. 1987) and *United*

States v. Bigman, 906 F.2d 392 (9th Cir. 1990). In *Brown*, the Fifth Circuit held that counsel's failure to inform the defendant of a venue defense prior to his guilty plea rendered counsel's performance below the objective standard of reasonableness. Because of this omission, the court believed the defendant was unable to make an informed and conscious choice with respect to his plea. *Brown*, 811 F.2d at 942. In *Bigman*, this circuit required remand for an evidentiary hearing due to uncertainty whether the defendant had been apprised of the intent element of the crime to which he pleaded guilty.

Unlike *Brown* and *Bigman*, however, any omission on Kehne's part was not the result of his incompetence as counsel. Creech simply did not allow his counsel to inform him of the elements of the offense or possible defenses. The transcript of the August 28 plea hearing shows that Kehne explicitly told the court in Creech's presence that the guilty plea was against his advice. As the district court properly noted, "a defendant may not be forced to abide by the advice of counsel."[1]

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[1] Creech now characterizes his actions as a waiver of the right to counsel and argues that under *Faretta v. California*, 422 U.S. 806, 817 (1975) his waiver cannot stand since he was not advised of the "dangers and disadvantages of self-representation." We believe the issue here is more properly seen as whether Creech voluntarily and knowingly pleaded guilty, not whether he waived counsel.

At the hearing, Judge Newhouse attempted to ensure that Creech was aware of the dangers of pleading guilty. In response to the judge's questions, Creech acknowledged that he understood that by pleading guilty. In response to the judge's questions, Creech acknowledged that he understood

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Furthermore, at that hearing Creech told the court that he had discussed the plea with counsel, that he believed he had sufficient time to discuss his plea with counsel, that he was satisfied with his attorney's representation, and that he understood that by pleading guilty he was giving up any defense to the charge.

Kehne told Creech that his advice was to not change the plea. He also told Creech that he needed more time. Nevertheless, Creech informed the court that he wished to proceed and plead guilty. We cannot now accept the claim that Creech was therefore unfairly deprived of the assistance of counsel. Kehne's actions were reasonable under the circumstances.

Creech has also failed to show that he was prejudiced. In *Hill v. Lockhart*, 474 U.S. 52, 58 (1985), the Supreme Court held that requiring a showing of prejudice serves "the fundamental interest in the finality of guilty pleas." The Court noted that,

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast

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that by pleading guilty he was admitting the crime, giving up any defenses to the charge, and forgoing his constitutional rights to trial by jury and to confront his accusers, as well as the privilege against self-incrimination. Creech also acknowledged that he understood that the maximum penalty for first degree murder was death.

> majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.

Id. (quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979)).[2]

First, with respect to Creech's claim that he did not understand the elements of the offense of first degree murder, Creech contends that the "malice" element was not adequately explained to him. The Supreme Court has stated that a plea may be involuntary "because [the defendant] has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). "Without . . . proof that [the defendant] in fact understood the charge, the plea cannot be voluntary . . ." *Id.*

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[2] *See also Evans v. Meyer*, 742 F.2d 371 (7th Cir. 1984). In *Evans*, the court, in holding that prejudice must be shown in cases where the defendant claims ineffective assistance of counsel due to counsel's failure to inform him of a defense, stated,

> Among other objections to holding [otherwise] is that it would create an exquisite conflict between the lawyer's duty to his client and to justice; for by holding back from his client some unimportant information about litigation options, the lawyer would guarantee that the client could get his guilty plea set aside as involuntary if he was dissatisfied with the sentence he received after pleading guilty.

Id. at 374.

The district court correctly rejected Creech's argument that his ignorance of the elements of first degree murder should invalidate his plea. It found that "Creech understood that malice or intent was an element of first degree murder at the time he pled guilty."

The state trial judge's colloquy with Creech at his August 28, 1981 plea hearing supports the district court's decision. In particular, the trial court asked Creech the following:

> Q (by the Court): What, as you understand it, does a person have to do to be guilty of the charge of first degree murder? What does it mean to you?
>
> A: He has got to think about doing it.
>
> Q: And killing someone.
>
> A: And killing someone.

Moreover, shortly after this exchange, the prosecution inquired as follows:

> Q (by Mr. Harris): Mr. Creech, did you intend to kill Mr. Jensen? . . .
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> A: When I first had the fight with him, no. But the second time, yes, I did intend to kill him.
>
> Q: That was later in the day?
>
> A: Yes, sir.
>
> Q: Did you take action to kill him after he was no longer a threat to you? Was in no condition to hurt you?
>
> A: Yes, I did.
>
> Q: What did that include?

A: I kicked him in his throat and his head.

Q: Was that after he was unconscious?

A: He wasn't all the way unconscious, but he was down on the floor.

Therefore, on the basis of Creech's own testimony the district court correctly concluded that Creech understood that malice aforethought was an element of the charge.[3]

Second, with respect to Creech's claim that neither the court nor his attorney explained the defense of "imperfect self-defense," Creech argues that without such an explanation he did not have a full understanding of the law in relation to the facts. This issue was not addressed by the district court, although it found as a matter of fact that counsel did not discuss with Creech possible defenses to the murder charge.

In *Sober v. Crist*, 644 F.2d 807, 809 n.3 (9th Cir. 1981), we held that "[t]he accused should be made aware of possible defenses, at least where the attorney or court is made aware of facts that would constitute such a defense." Because Creech arguably could have claimed imperfect self-defense, he may have been prejudiced by his lack of knowledge.

The state argues, however, that the failure of counsel or the court to explain this defense constituted harmless error. *See United States v. Lopez*, 575 F.2d 681, 685 (9th Cir. 1978) (where a constitutional error is found, an appellate

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[3] Creech concedes that the quoted colloquy "[a]rguably . . . shows that Mr. Creech understood that premeditation was required for first degree murder."

court's duty is to reverse unless it is "able to declare a belief that it was harmless beyond a reasonable doubt.") (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The State points to Creech's earlier murder convictions and his repeated attempts to interpose self-defense as a defense to those crimes as evidence that Creech knew of the possible defenses to the crime. Creech counters that nothing in the record shows that, relative to the Jensen murder, he had an understanding of this defense. Appellees also argue that any error was harmless because such a defense would have been contrary to the "overwhelming" evidence against Creech. In *Evans v. Meyer*, 742 F.2d 371 (7th Cir. 1984), the court opined that where uncontested facts make it inconceivable that a jury would acquit on the proposed defense, a plea entered without the defendant's knowledge of the defense can nevertheless be voluntary. *See also Hill*, 474 U.S. at 59 ("[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial").

After conducting our own review of the record in this case, we find it "inconceivable . . . , and not merely improbable . . . that [Creech] would have gone to trial on a defense of [imperfect self-defense], or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received." *Evans*, 742 F.2d at 375. Even assuming his attorney's performance was not reasonable, we believe Creech's ignorance of the possible

defense of "imperfect self-defense" was harmless beyond a reasonable doubt.

IV

During his August 28, 1981 plea hearing, at Kehne's insistence, Creech reserved the right to withdraw his guilty plea if psychological evaluations showed Creech incompetent to plead guilty. Creech claims in his petition that the testimony of Doctors Stoner and Heyrend substantiate his claim of incompetence; consequently, he argues that he should be allowed to withdraw his plea.[4]

A defendant is not competent to plead guilty if "mental illness has substantially impaired his or her ability to make a reasoned choice among the alternatives presented to him and to understand the nature and consequences of his plea." *Sieling v. Eyman*, 478 F.2d 211, 215 (9th Cir. 1973).[5] The district court found that Creech failed to show that he was incompetent at the time he entered his guilty plea. Creech's central contention is that the district court

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[4] Respondent's assertion that this claim was not raised below is without merit.

[5] It is unclear whether a state court's determination of competency to plead guilty is entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *Cf. Harding v. Lewis*, 834 F.2d 853, 856 (9th Cir. 1987), *cert. denied*, 488 U.S. 871 (1988) (trial court's conclusion of competence to *waive counsel* subject to de novo review); with *Evans v. Raines*, 800 F.2d 884, 887 (9th Cir. 1986)(competence to *stand trial* is a factual issue entitled to the presumption). Regardless of whether the presumption of correctness attaches here, Creech's claim is without merit.

erred in this finding because it applied the wrong standard. Contrary to Creech's assertion, however, it is apparent from the opinion below that the district court simply concluded that there was no evidence that Creech was incompetent to plead guilty.

We affirm the district court's conclusion regarding Creech's competency to plead guilty. Contrary to Creech's assertion, Dr. Heyrend did not conclude that Creech could not appreciate the consequences of decisions such as waiving legal rights. When asked, "Do you have any information or evidence to indicate to your satisfaction that at the time of the defendant's plea in this case, that he did not intend to plead guilty or did not recognize the consequences of that legal act?," Dr. Heyrend replied, "I really have no information in that area." While Dr. Stoner was more supportive of Creech's position, even he admitted, "I think there's room to be more certain than I am in this case." Creech failed to show that he was incompetent to plead guilty.

V

Creech next claims that his rights to confrontation was violated because he had no meaningful opportunity to cross-examine the sources of information contained in his presentence report. At Creech's January, 1982 sentencing hearing, Judge Newhouse took judicial notice of the presentence report, which included reports from several Idaho psychiatrists, a previous presentence report from an Ohio conviction containing reports from Ohio psychologists, psychiatric evaluations from Oregon doctors, and numerous newspaper articles and editorials. The Idaho

Supreme Court in *Creech I* found that all the material in the presentence report was considered by the sentencing judge. 670 P.2d at 468.

The trial judge at sentencing may appropriately conduct a broad inquiry largely unlimited as to the kind of information to be considered or the source of such information. *United States v. Grayson*, 438 U.S. 41, 50 (1978). The Supreme Court in *Williams v. New York*, 337 U.S. 241 (1949), expressly approved of a sentencing court's reliance on information contained in a presentence report in imposing a death sentence. The Court wrote that "most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination." *Id.* at 250.[6]

Neither the district court nor the Idaho Supreme Court addressed the claim that Creech was denied an opportunity to rebut or explain the testimony contained in the presentence report. The only reference to this issue is Judge Huntley's dissent in *Creech I* which stated that Creech could not rebut the information in the presentence report through the device of cross-examination. 670 P.2d at 480 n.1 (Huntley, J., dissenting). It is apparent, however, that Creech had the opportunity, other than through cross-examination, to dispute the accuracy of the presentence report prior to and at his January, 1982 sentencing

[6] The Idaho Supreme Court in *Creech I* held that Creech had no right under Idaho law to a presentence report containing only testimony from live witnesses subject to cross-examination. 670 P.2d at 466-469.

hearing because his counsel was given the report prior to the sentencing hearing.

Because Creech had the opportunity to rebut, deny or explain the information contained in the presentence report, this case is distinguishable from *Gardner v. Florida*, 430 U.S. 349, 356 (1977), and is in line with *Williams v. New York*, 337 U.S. 241 (1949).[7] In *Gardner*, the Court ruled that the defendant was denied due process of law when the death sentence was imposed on the basis of information never disclosed to him. 430 U.S. at 362 (plurality opinion). *Gardner* relied on the absence of *any* opportunity for counsel to challenge the accuracy of information contained in a presentence report. *Id.* at 356 (distinguishing *Williams*), 358-62. We conclude that Creech's right to confrontation was not violated in this case.

[7] Although Creech is correct in asserting that in *Williams* the sentencing judge stated the facts upon which it was relying in open court, the opportunity to rebut, explain or deny the information contained in the presentence report was nevertheless available both in *Williams* and in this case. In fact, Creech had more time in which to examine the report and refute its inaccuracies than did the defendant in *Williams*, who learned of the information at the sentencing hearing itself. The state trial court in this case specifically found that Creech had access to the report for at least seven days prior to his sentencing hearing, as required by Idaho law.

Creech argues that due to *Gardner*, *Williams* is no longer good law. Although *Gardner* stated that standards of procedural fairness had evolved since *Williams* was decided, it distinguished rather than overruled *William's* holding. *Gardner*, 430 U.S. at 356.

VI

Creech claims that he is entitled to a new sentencing hearing due to the trial court's unconstitutional application of the Idaho sentencing statute, Idaho Code § 19-2515. Creech alleges three errors: (1) the trial court refused to allow him to present any mitigating evidence at his March 17, 1983 resentencing hearing in violation of the Eighth and Fourteenth Amendments; (2) at his sentencing hearing, the court found two aggravating circumstances without making a required finding beyond a reasonable doubt; and (3) one of the aggravating circumstances applied by the trial court, that Creech demonstrated an "utter disregard for human life", is unconstitutionally vague. Creech argues that due to these errors, an improper balance of aggravating and mitigating circumstances resulted. We address each contention in turn.

A

The Idaho Supreme Court vacated Creech's original sentence of death because the trial judge failed to pronounce the sentence in the presence of the defendant as required by Idaho law. The court ordered resentencing to occur within fourteen days from the date of its order. Creech argues that he did not have an opportunity to introduce mitigating testimony relating to his conduct during the fourteen months between his sentencing and resentencing hearings. This new mitigation evidence would have included testimony by prison guards and spiritual advisors about Creech's good behavior in prison, his personal growth and increased sensitivity, and

his writing and recording of a song for a young girl badly injured in an automobile accident.

Upon remand, the trial court simply read the sentence of death to Creech. This second sentence of death was affirmed in *Creech I*, 670 P.2d at 476. The district court found "no constitutional provision which would require the state courts to again conduct the full sentencing hearing at which Creech could present mitigating circumstances."

Creech asserts that although he was allowed to present any and all mitigating evidence at his initial sentencing hearing, because the Supreme Court of Idaho voided that sentence and ordered resentencing, constitutionally he must be allowed another opportunity to do so. He argues that the resentencing hearing was not ordered simply to correct a procedural defect. In addition, he contends that in capital resentencing hearings, a defendant must be allowed to present mitigating evidence to ensure the reliability of death sentences.

This argument appears to be correct. In *Sivak v. State*, 731 P.2d 192 (Idaho 1986), the Idaho Supreme Court ruled on the precise claim presented here. The court found that an order *identical* to the one at issue here, issued to the *same judge* (Judge Newhouse), and based on the *same error* as present here mandated that the trial judge permit the introduction of new mitigating evidence at the resentencing hearing.

The *Sivak* court held that evidence of a defendant's good behavior and peaceful adjustment while in prison was mitigation evidence, *id.* at 196-97, and that the principles of *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v.*

Oklahoma, 455 U.S. 104 (1982), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), required that a defendant be allowed to offer such mitigating evidence at resentencing. *Sivak*, 731 P.2d at 197. The Idaho Supreme Court's discussion is highly persuasive.

Like the Idaho Supreme Court, *id.*, we see no rational basis for distinguishing the evidence of a defendant's good conduct while awaiting trial and sentencing, and evidence of a defendant's good conduct pending review of a death sentence which is vacated on appeal. On this basis, we reverse and remand with instructions to grant the petition. The writ shall order Creech's release if, within a reasonable time set by the district court, Idaho fails to vacate Creech's sentence and provide Creech with a resentencing hearing at which he can present any and all mitigating evidence that exists at the time of the hearing.

B

Creech claims that the trial court applied two aggravating circumstances without making a required finding. The trial court found as aggravating circumstances that "defendant was under a sentence for Murder of the First Degree at the time of his actions" and that "defendant committed the murder on a fellow inmate while both were incarcerated in the Idaho State Correctional Institution." Each is an element of the crime of first degree murder for which Creech was charged. *See* Idaho Code § 18-4003(c),(e) (1987).

To properly constitute aggravating circumstances under Idaho law, the elements contained in sections

18-4003 (c) and (e) must be combined "with the specific intent to cause . . . death of a human being." Idaho Code § 19-2515 (g)(7) (1987). Creech argues that Judge Newhouse failed to find such an intent beyond a reasonable doubt; therefore, he asserts, the judge listed these aggravating circumstances without determining if they should apply.[8]

We find that there is evidence by which Judge Newhouse could have concluded that Creech had specific intent. At the time he pleaded guilty, Creech admitted that he intended to kill Jensen.[9] Nevertheless, Judge Newhouse's Findings fail to indicate that he found specific intent beyond a reasonable doubt before applying section 19-2515 (g)(7).[10] On remand, the district court shall grant the petition. The writ shall order Creech's release if the state judge at resentencing applies the

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[8] Creech originally argued, relying on *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), that the sentence was unconstitutional because these two aggravating factors were nothing more than elements of first degree murder. Acknowledging that *Collins* has been overruled, *see Perry v. Lockhart*, 871 F.2d 1384, 1392 (8th Cir.), *cert. denied*, 110 S. Ct. 378 (1989) Creech no longer makes this argument.

[9] In response to the State's question of whether he intended to kill Jensen, Creech replied, "When I first had the fight with him, no. But the second time, yes, I did intend to kill him."

[10] Not only did Judge Newhouse fail to mention specific intent in his listing if these aggravating circumstances, he also found that Jensen instigated the fight and that Creech's actions evidenced "an excessive violent rage." His only findings of intent were "The murder, once commenced, *appears* to have been an intentional, calculated act." (emphasis added)

aggravating circumstances under this section without making a finding of specific intent.

C

Creech claims that the statutory aggravating circumstance, that "the defendant exhibited utter disregard for human life," Idaho Code § 19-2515 (g)(6), is unconstitutionally vague. Recently, the Supreme Court announced the process by which we review such a challenge. In *Walton v. Arizona*, 110 S. Ct. 3047, 3057 (1990), the court held:

> When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and if they have done so, whether those definitions are constitutionally sufficient, *i.e.*, whether they provide *some* guidance to the sentencer.

Applying *Walton*, we first conclude that the aggravating circumstance listed in section 19-2515 (g)(6) is unconstitutionally vague. Idaho defines murder as "the unlawful killing of a human being with malice aforethought." Idaho Code § 18-4001 (1987). In section 18-4003, Idaho separates murder into first and second degree. Only those convicted of first degree murder are

statutorily eligible to be sentenced to death. Idaho Code § 18-4004 (1987). Given that some defendants who kill with malice aforethought are not even eligible to be sentenced to death, we fail to see how the aggravating circumstance of "the utter disregard for human life" permits "the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." *Lewis v. Jeffers*, 110 S. Ct. 3092, 3099 (1990).

In *State v. Osborn*, 631 P.2d 187 (Idaho 1981), the Idaho Supreme Court also recognized the infirmity of section 19-2515 (g)(6). The court held, "it is . . . apparent under *Godfrey* that this court must place a limiting construction upon [the "utter disregard"] aggravating circumstance[ ] so as to avoid the possibility of [its] application in an unconstitutional manner." 631 P.2d at 200 (citing *Godfrey v. Georgia*, 446 U.S. 420 (1980)). We therefore analyze, under the second step of *Walton*, whether the aggravating circumstance, as construed by the Idaho Supreme Court at the time Creech was sentenced, was unconstitutionally vague.[11]

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[11] Creech argues that we may not review the limiting construction because it was not explicitly applied by the trial judge. The Supreme Court's words in *Walton*, however, are instructive:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*. But the logic of those cases has no place in

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The Supreme Court has found that aggravating circumstances must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (quotations and footnotes omitted). "[T]he channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

Given this standard, we find that the narrowing construction of section 19-2515 (g)(6), as applied to Creech, was unconstitutionally vague. Having concluded that the statutory language "the defendant exhibited utter disregard for human life" was too vague, the Idaho Supreme Court limited it by stating "the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *Osborn*, 631 P.2d at 201.[12]

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the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions.

Walton, 110 S. Ct. at 3057. Although the trial judge used the language of the statute, we follow the Supreme Court's lead and presume that he applied the limiting instruction.

[12] The Idaho Supreme Court also noted that,

To properly define [the "utter disregard"] circumstance, it is important to note the other aggravating

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This limiting construction gives no more guidance than the statute. Rather than defining "utter disregard," the court in *Osborn* merely emphasized it. But the problem with the "utter disregard" standard is not that it is too low a threshold, it is that it is unclear. Idaho's limiting construction does not resolve this infirmity. Just as it is difficult to determine what constitutes "utter disregard for human life," it is unclear what constitutes "the highest, the utmost, callous disregard for human life." The Supreme Court noted in *Cartwright*, 486 U.S. at 364, that the "contention that the addition of the word 'especially'

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circumstances with which this provision overlaps. The second aggravating circumstance, I.C. § 19-2515 (f)(2), that the defendant committed another murder at the time this murder was committed, obviously could show an utter disregard for human life, as could the third aggravating circumstance, I.C. § 19-2515 (f)(3), that the defendant knowingly created a great risk of death to many persons. The same can be said for the fourth aggravating circumstance, I.C. § 19-2515 (f)(4), that the murder was committed for remuneration. Since we will not presume that the legislative intent was to duplicate any already enumerated circumstance, thus making I.C. § 19-2515 (f)(6) mere surplusage . . . , we hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in I.C. §§ 19-2515 (f)(2), (3), and (4).

Rather than explaining what "utter disregard for human life" means, this passage merely recognizes that the legislature must have meant it to mean something other than the preexisting aggravating circumstances. Since none of these aggravating circumstances are at issue, this language does not help us to determine the meaning of "utter disregard."

somehow guides the jury's discretion, even if the term 'heinous' does not, is untenable." *Cartwright's reasoning appears to apply here.*

Godfrey speaks of "clear and objective" standards. The Court has approved limiting constructions that have defined the terms of the statutory aggravating circumstance through objective standards. In *Walton v. Arizona*, 110 S. Ct. 3047, 3057 (1990) the Court upheld an aggravating factor of "especially heinous, cruel or depraved" when it noted that the aggravating factor had the following limitations: "[A]n especially cruel manner [is] when the perpetrator inflicts mental anguish or physical abuse before the victim's death," *id.* at 3057, and "an especially 'depraved' manner [is] when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing." *Id.* at 3058.

In *Cartwright*, 486 U.S. 356, the Court affirmed the Tenth Circuit's conclusion that Oklahoma's aggravating circumstance of "especially heinous, atrocious or cruel" was still unconstitutionally vague even though Oklahoma had defined "heinous" as "extremely wicked or shockingly evil" and had defined "atrocious" as "outrageously wicked and vile,"[13] According to the circuit court, "Vague terms do not suddenly become clear when they are defined by reference to other vague terms." *Cartwright v. Maynard*, 822 F.2d 1477, 1489 (10th Cir. 1987). The Court

[13] Recently, the Supreme Court reaffirmed its holding in *Cartwright* in the context of an identical Mississippi aggravating factor with the same limiting constructions. *Shell v. Mississippi*, 111 S.Ct. 313 (1990).

agreed with the Tenth Circuit, however, that a limiting instruction of "some kind of torture or physical abuse", while not the only permissible construction, would have made the aggravating circumstance constitutional.[14]

Unlike those cases, where the sentencer could make an objective determination of whether specific acts occurred, the Idaho limiting construction calls for a subjective determination of whether the defendant is a "cold-blooded, pitiless slayer." The limiting construction therefore fails to channel the sentencer's discretion.

The vagueness of the *Osborn* limiting construction is apparent by its application in this case. In his Findings in sentencing Creech to death, Judge Newhouse found that Creech "did not instigate the fight with the victim, but the victim, without provocation, attacked him. He is initially justified in protecting himself." While he found that "[a]fter the victim was helpless the defendant killed him," Judge Newhouse also noted that the murder "evidenc[ed] an excessive violent rage."[15] Given these factual findings, we cannot agree with the conclusion that by the murder itself, or circumstances surrounding its commission, Creech demonstrated that he was a cold-blooded

[14] *See also, Proffit v. Florida*, 428 U.S. 242, 255 (1976) (approving "especially heinous, atrocious or cruel" limited to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim.").

[15] Judge Newhouse also found that "The murder, *once commenced*, appears to have been an intentional, calculated act." (emphasis added).

pitiless killer.[16] We therefore find the Idaho limiting construction is unconstitutionally vague.

D

We have found that one of the five statutory aggravating circumstances cited by Judge Newhouse, that Creech exhibited utter disregard for human life, is unconstitutionally vague. Second, we have found that two additional aggravating circumstances were applied without the required finding of specific intent. Finally, we have found that Creech must be given an opportunity to provided any additional mitigating evidence.

Idaho Code section 19-2515 (c) holds that a sentence of death may not be imposed unless the court finds at least one statutory aggravating circumstance. Even with our findings today, this requirement has been met. Section 19-2515 (c) goes on, however, and requires a balancing of mitigating and aggravating circumstances. Given our findings, the weight of both types of factors is apt to

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[16] In its briefs, the State argues that "utter disregard" is sufficiently specific, as it applies only to calculated murders. According to the State, "[M]urders that result from a strong provocation or objectively reasonable emotional distress are not comprehended by [the section]." If this is what the limiting construction means, then it was improperly applied to Creech. While the State argues that "Creech cold-bloodedly contrived the murder of David Jensen", this was not the finding of the trial court. *See Creech I*, 670 P.2d at 465 ("There is some evidence in the record indicating that Creech had been enticed by other inmates to 'do Jensen in,' but the district judge did not decide or find that the murder had been performed on contract or by plan."

change. Thus, we cannot rely on the trial court's conclusion that Creech deserved the death penalty. *See Clemons v. Mississippi*, 110 S. Ct. 1441, 1450 (1990); *Cartwright v. Maynard*, 822 F.2d 1477, 1483 (10th Cir. 1987) ("A death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments."), *aff'd*, 486 U.S. 356 (1988).

We therefore reverse and remand with instructions to grant the petition. The writ shall order Creech's release unless, within a reasonable time set by the district court, the Idaho court balances the remaining, constitutionally valid aggravating and mitigating factors in order to determine whether Creech should be sentenced to death.

VII

Creech claims that the Constitution guarantees a jury trial on the existence of aggravating circumstances which may result in the imposition of a sentence of death. Creech draws the following analogy: some of the aggravating circumstances found by the state court are facts analogous to elements of the crime of "capital murder" and must be proven beyond a reasonable doubt; therefore, a jury must determine their existence.

In rejecting Creech's claim, the district court relied on *Spaziano v. Florida*, 468 U.S. 447 (1984). In *Spaziano*, the Supreme Court rejected the argument that "placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional." *Id.* at 464. Creech attempts to distinguish *Spaziano* and similar Supreme

Court cases by asserting that while the exercise of discretion in sentencing may remain with the trial judge, the jury must find the existence of facts, such as aggravating circumstances.

Creech's argument has been fully rejected by the Supreme Court. In *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986), the Court wrote that "[s]entencing courts have traditionally heard evidence and found facts . . . . " The Court further opined that the claim that a jury must find sentencing considerations "merits little discussion." *Id.* at 93. The Court ultimately held in *McMillan* that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Id.* (citing *Spaziano*).

More recently, the Court specifically held in *Hildwin v. Florida*, 109 S. Ct. 2055, 2057 (1989) that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *See also Walton v. Arizona*, 110 S. Ct. 3047, 3054 (1990). We therefore find that consistent with these cases, Creech had no constitutional right to a jury trial on the existence of aggravating circumstances.

VIII

Creech claims that the Idaho capital sentencing scheme violates the Eighth Amendment because it provides a mandatory sentencing formula. Specifically, Creech argues that Idaho Code § 19-2515(c) is unconstitutional. Section 19-2515(c) provides:

> "[w]here a person is convicted of an offense which may be punishable by death, a sentence

> of death shall not be imposed unless the court finds at lease one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court *shall* sentence the defendant to death *unless* the court finds that mitigating circumstances which may be presented *outweigh* the gravity of any aggravating circumstance found and make imposition of death unjust.

Idaho Code § 19-2515(c) (1987) (emphasis added).

The basis of Creech's contention is that the Idaho courts *shall* apply the death penalty *unless* mitigating circumstances outweigh the aggravating circumstances and make the imposition of death unjust. Idaho Code § 19-2515(c) (1987). Creech claims this removes an "individualized determination" and a "moral response" in sentencing.

Appellees argue that the Idaho sentencing scheme is valid because it permits the sentencing court to consider all relevant mitigating evidence, consistent with *Lockett v. Ohio*, 438 U.S. at 602-08. In addition, appellees note that the statute places upon the state the burden of proof to show at least one statutory aggravating circumstance beyond a reasonable doubt, thus fulfilling the "narrowing function" required by *Zant v. Stephens*, 462 U.S. 862, 877 (1983). As construed by the Idaho Supreme Court, moreover, appellees point out that the defendant's burden with respect to mitigating circumstances is not one of persuasion but, rather, one of "rais[ing] any factors which might possibly tend to mitigate his culpability for the offense." *State v. Osborn*, 631 P.2d 187, 199 (1981).

This issue has been recently resolved by the Supreme Court. In *Blystone v. Pennsylvania*, 110 S. Ct. 1078 (1990), the Court rejected a challenge to a similar requirement, holding that such a statute is not "impermissibly mandatory", *id.* at 1082, and that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Id.* at 1083. Similar statutes have been upheld in other cases. *See Boyde v. California*, 110 S. Ct. 1190 (1990); *Walton*, 110 S. Ct. 3047. We therefore find that section 19-2515(c) is constitutional.

IX

Creech finally claims that we should remand this case to the district court because the district court improperly limited its evidentiary hearing on his petition. Under *Townsend v. Sain*, 372 U.S. 293, 312-13 (1963), a district court must hold an evidentiary hearing if (1) the petitioner's allegations, if proved, would entitle him to relief, and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. An evidentiary hearing must be held if, for example, state court fact-finding procedures were inadequate, or the material facts were not adequately developed at the state court hearing. *Id.* at 313.[17] Creech's claim with respect to

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[17] Under *Townsend*, 372 U.S. at 313:

> [A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual

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the legal requirement of an evidentiary hearing is twofold.

First, although Creech admits that he addressed each factual issue in his February 1984 state post-conviction plea withdrawal hearing, he claims that hearing was inadequate because he was given only two weeks to file all his post-conviction collateral state proceedings and two additional weeks to fully prepare for the hearing. Consequently, Creech argues that an evidentiary hearing under *Townsend* was required on several claims presented to the district court.

The district court's opinion does not address this claim. Further, Appellees do not address Creech's allegations and the only evidence on this claim is the self-serving affidavit of Creech's counsel. The Idaho Supreme Court opinion in *Creech II*, 710 P.2d 502 (1985), however, addresses the precise issue raised by Creech. Creech's death sentence was affirmed by the Idaho Supreme Court on May 23, 1983 and it was not until January 24, 1984 that Creech was ordered to make his final post-conviction challenges. *Id.* at 507. Consequently, counsel's complaint

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> determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

that he had only four weeks to prepare his case is not accurate.

In justifying the limited time afforded Creech to make his final post-conviction challenges, the Idaho Supreme Court in *Creech II* relied on *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983), for the proposition that "the use of summary procedures for the expeditious resolution of collateral proceedings in death penalty cases" is proper. 710 P.2d at 507. In *Barefoot*, the Supreme Court cited its prior cases which approved the summary procedures adopted by the Circuit Courts of Appeal for the disposition of habeas appeals on the merits before the scheduled date of execution. 463 U.S. at 889.

Creech has had a full and fair opportunity to present the relevant facts of his claims. Counsel had more than enough time between the affirmance of Creech's death sentence and the deadline for filing of post-conviction challenges to prepare any post-conviction claims for relief. Consequently, we hold that Creech is not entitled to an evidentiary hearing on his basis.

Creech's second argument is that the state court did not issue written findings on his claims that he was suicidal when he entered the guilty plea and that his plea was motivated by threats against his family. Therefore, Creech argues the district court could not have concluded that these issues were reliably determined by the state trier of fact and an evidentiary hearing is required.

The district court found that "[t]here is nothing in the record to suggest Creech was suicidally depressed at the time he entered his plea of guilty," and that Creech's "self-serving testimony" with respect to threats against

his family was insufficient to invalidate his plea. Although the district court did not make this point clear, it must have made these determinations without an evidentiary hearing based on the implied findings of the state trier of fact. Under *Townsend*, state court factual determinations may be implied from the actions taken by the state court. *See Townsend*, 372 U.S. at 314; *Butcher v. Marquez*, 758 F.2d 373, 376 (9th Cir. 1985). For example, "[w]hen a state trial court holds a hearing to suppress evidence and rules on the motion, a federal district court may assume that the state court found the facts necessary to support the state court's decision, unless there is some indication that the state court applied an incorrect legal standard." *Knaubert v. Goldsmith*, 791 F.2d 722, 727 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986).

In the instant case, it appears from the state trial court's February, 1984 denial of Creech's motion to withdraw his plea that Judge Newhouse implicitly rejected the factual circumstances that Creech alleges invalidate his plea and that Creech asserts require an evidentiary hearing. Moreover, although the state trial court did not issue written findings concerning the February, 1984 withdrawal hearing,[18] the Idaho Supreme Court, in affirming the state trial court in *Creech II*, held that Creech offered no evidence other than his own assertions to support either of his arguments. *Cf. Sumner v. Mata*, 449 U.S 539, 546-47 (1981) (28 U.S.C. § 2254(d) presumption of correctness of state court findings applies equally

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[18] The state trial court found only that it would not be manifestly unjust to deny Creech's motion to withdraw the guilty plea.

to state trial court and state appellate court fact-finding). We affirm the district court's denial of an evidentiary hearing on these issues.

Creech also contends that a remand is required because he did not have an opportunity to present evidence on the medication issue to the district court. Creech argues he should have been granted a continuance in order to prepare for an evidentiary hearing. A district court's decision regarding a motion for a continuance is reviewed for an abuse of discretion. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

The district court found that Creech did not "advise the court that notification of the parties on May 22, 1986, as to the nature and scope of the May 29th hearing would not provide counsel with adequate time to prepare for that hearing." Moreover, the district court found that Creech's own delinquency culminated in the limited period of time between the deadline for briefing and the May 29th hearing date. Further, Creech's counsel admitted as much at the May 29th hearing, stating "I frankly am not prepared to present medical evidence today and . . . that was my confusion and it was my fault. . . . "

Creech was given one week's notice of the nature and scope of the evidentiary hearing. In conjunction with Creech's delinquency and the amount of time for Creech to prepare his case between the filing of the habeas petition on January 29 and the May 29 hearing (not to mention the four years between Creech's initial sentencing on January 25, 1982 and the filing of his petition), we conclude that the district court did not abuse its discretion in denying Creech a continuance.

X

We AFFIRM the district court on Creech's claims of ineffective assistance of counsel, incompetence to plead guilty, involuntary and unknowing guilty plea, denial of his right to confrontation, and need for an evidentiary hearing. We also AFFIRM the district court's conclusion that Creech had no right to a jury trial on the existence of aggravating factors and that he was not sentenced pursuant to a mandatory death penalty formula. We REVERSE and direct the district court to grant the petition on Creech's claim that the state trial court relied on improper aggravating circumstances, and that prohibiting him from introducing evidence of mitigating circumstances at his resentencing hearing violates the Constitution.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TROTT, Circuit Judge dissenting from the order denying rehearing en banc. KOZINSKI and T. G. NELSON joining.

I respectfully dissent from the court's refusal to rehear this case en banc, and I do so because I disagree with the panel's analysis in Part C.

Thomas Creech is a killer. He personifies an "utter disregard for human life." In this case, with the intent to kill, he beat a fellow inmate to death while serving a life sentence in Idaho for murder. The Idaho Supreme Court has made the following statement about him:

> The defendant here committed murder at least four times prior to the instant offense,

twice in Idaho and also in Oregon and in California. There presently exist other pending charges of murder in the first degree against him. The testimony of an eyewitness to one of Creech's previous murders, coupled with psychiatric evidence, tends to prove that the appellant is violent and vengeful and that he experiences no remorse for his actions. Letters written by Creech to law enforcement personnel detail numerous alleged murders beyond those for which he has already been convicted and intimate his intentions to kill in the future. Creech's own statements claim responsibility for approximately 40 murders. However vague the statutory language might be argued to be in the ordinary case (which assertion we have already rejected), nevertheless, as applied in the instant case, we hold beyond any doubt whatsoever that the appellant here has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

State v. Creech, 670 P.2d 463, 472 (Idaho 1983).

My concern however, is not so much that Creech's sentence is being returned to Idaho's courts to be redone as it is with a serious and possibly irremediable error made by the panel in holding that one of the statutory aggravating factors relied on by Idaho to sentence him to death is unconstitutionally vague. The error may effectively be irremediable because if Creech is resentenced to death in state court in accord with the orders of the panel's opinion, and the case then resurfaces in federal court, which is probable, it will most certainly do so on the basis of different aggravating circumstances. Thus, unless the error is attended to now, Idaho may be blocked

from ever bringing this error – which now becomes the binding law of our circuit as to this aggravating circumstance – to the attention of any court for correction. This is also true if Creech is not resentenced to death and the question of capital punishment disappears from future federal actions filed by him. As it now stands we have failed to accord appropriate deference to the Idaho Supreme Court decision in *Osborn*, and we have thereby improperly amputated a legislative enactment of a sovereign state.

To be specific as to the nature of the error, I believe the panel has misapplied the holding of the Supreme Court in *Walton v. Arizona*, 110 S. Ct. 3047, 3057 (1990) in such a way as to bring about one application of the *Walton* test for Arizona, and a different application of the same test for Idaho. The panel's misapplication of the test violated the unremarkable precept that federal law, and especially Constitutional law, shall be uniformly applied.

The aggravating circumstance in question is that "by the murder or circumstance surrounding its commission the defendant exhibited utter disregard for human life." Idaho Code § 19-2515(g)(6). I would agree with the panel that this *bare* language is thin under *Walton*, but I respectfully but strongly disagree with the panel's conclusion that the limiting construction placed on this language by the Idaho Supreme Court in *State v. Osborn*, 613 P.2d 187 (Idaho 1981) falls short of the mark established by the United States Supreme Court in *Godfrey v. Georgia*, 446 U.S. 420 (1980). The Idaho Supreme Court in *Osborn* explicitly recognized its duty under *Godfrey* and *Gregg v. Georgia*, 428 U.S. 153 (1976) to define vague terms so as to

give adequate guidance to the sentencer. On this issue, Idaho's highest court spoke as follows:

> A similar limiting construction must be placed upon the aggravating circumstances in I.C. § 19-2515(f)(6)[1], that "[b]y the murder, or the circumsantces surrounding its commission, the defendant exhibited utter disregard for human life." To properly define this circumstance, it is important to note the other aggravating circumstance with which this provision overlaps. The second aggravating circumstance, I.C. § 19-2515(f)(2), that the defendant committed another murder at the time this murder was committed, obviously could show an utter disregard for human life, as could the third aggravating circumstance, I.C. § 19-2515(f)(3), that the defendant knowingly created a great risk of death to many persons. The same can be said for the fourth aggravating circumstance, I.C. § 19-2515(f)(4), that the murder was committed for remuneration. Since we will not presume that the legislative intent was to duplicate any already enumerated circumstance, thus making I.C. § 19-2515(f)(6) mere surplusage (*See, e.g., Norton v. Dept. of Employment*, 94 Idaho 924, 500 P.2d 825 (1972)), we hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in I.C. § 19-2515(f)(2), (3), and (4). We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer. With such an interpretation, it is our conclusion that this

[1] Section 19-2515(f)(6) is now section 19-2515(*g*)(6).

> aggravating circumstance meets the constitutional requirements set forth by the United States Supreme Court. Upon remand, the district court should, in accordance with his opinion and the provisions of I.C.R. 33.1 and 33.2 (enacted subsequent to original sentencing in this case), specifically set forth the facts and reasoning underlying the finding, if any, that a statutory aggravating circumstance exists.

State v. Osborn, 631 P.2d at 200-201.

Under the *Walton* rule, this not only gives "*some* guidance," *Walton*, 110 S. Ct. at 3057, it gives substantive guidance. It defines "utter disregard," in greater detail than the statute itself, and it goes farther by telling the sentencer that he or she cannot infer "utter disregard" solely from the fact that the defendant has committed multiple murder, nor can it be inferred solely from a murder for hire, nor can it be inferred solely from the fact that the defendant knowingly created a risk of death to many persons.

Idaho's "utter disregard" factor as focused by *Osborn* is indistinguishable from the aggravating circumstance approved by the Supreme Court in *Walton*:

> 'especially depraved' [i.e.], when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidence a sense of pleasure in the killing.'

Walton, 110 S. Ct. at 3058 (citation omitted). How "objective" is "relishing the murder, evidencing debasement or perversion"? How is that different from evidencing an "utter disregard for human life," defined as intentional,

cold-blooded, and without pity, and as requiring more than just mass murder, murder for hire, and endangering many people? This is not just "wicked and vile," as in *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988), which are simply pejorative adjectives that broadly describe the crime. This is "utter, callous, cold-blooded, and pitiless disregard for human life," which is a standard that can be proved with facts and circumstances. "Cold-blooded" means carried out without feeling or emotion. "Pitiless" means without compassion for suffering. Contrary to the panel's assertion, Idaho does *not* call for a purely "subjective determination" of whether a defendant is a "cold-blooded, pitiless slayer." Idaho requires an *evidentiary* determination supported by facts and circumstances.

Such a determination under Idaho law must be set out in writing, and it is subject to scrupulous appellate review.

Idaho Code § 19-2525(e) states:

> Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstances found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

About this section, the Idaho Supreme Court has said:

I.C. § 19-2515(d)[2] is mandatory in its terms: "the court *shall* set forth in writing any mitigating factors considered." The reasoning behind a similar statutory requirement for specific written findings was explained by the Florida Supreme Court:

> "The fourth step required by Fla. Stat. § 921.141. F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute." *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973) *cert. den.* 416 U.S. 943, 94 S. Ct. 1951, 40 L.Ed.2d 295 (1974).

> We feel the requirement of written and detailed findings serves a dual purpose. Initially it focuses the attention of the sentencing court upon all the information before it and requires a *thorough and reasoned analysis of all relevant factors.* This helps assure that the imposition of the sentence of death is reasoned and objective as constitutionally required. It also serves the purpose, as noted by the Florida Supreme Court, of making the process for imposing death rationally reviewable. *On review, if the mandated of I.C. § 19-2515(d) are met, we can determine whether the lower court overlooked or ignored any raised mitigating factors, whether the evidence supports the*

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[2] Section 19-2515(d) is now section 19-2515(*e*).

> *aggravating factors found, and finally whether the court has properly weighed all factors.* If the findings of the lower court are not set forth with reasonable exactitude, this court would be forced to make its review on an inadequate record, and could not fulfill the function of "meaningful appellate review" demanded by the decisions of the United States Supreme Court.

Osborn, 631 P.2d at 196-197 (emphasis added). These strict requirements add considerable substance to the process and coral the possibility of excessive subjectivity.

The Idaho Supreme Court was careful to verify the factual basis for the pertinent findings. The Supreme Court said:

> We turn now to *whether the sentencing judge complied with those statutory provisions.* Appellant argues that the court erred in finding beyond a reasonable doubt that the defendant has previously been convicted of other murders; that the defendant had exhibited utter disregard for human life and a propensity to commit murder; that the defendant was under sentence for first degree murder at the time of his actions; and that both defendant and his victim were inmates at the state penitentiary when the crime occurred. *We have reviewed the record and hold that the evidence at the sentencing hearing clearly supports the trial court's findings of aggravating and mitigating circumstances.*

Creech, 670 P.2d at 470.

Furthermore, Idaho Code § 19-2827 requires the Idaho Supreme Court to verify proportionality and to screen out passion, prejudice, and arbitrariness with

respect to *all* sentences of death. This section reads in relevant part as follows:

> (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Idaho. The clerk on the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Idaho and to the attorney general together with a notice prepared by the clerk and a report prepared by the trial judge setting forth the findings required by section 19-2515(d), Idaho Code, and such other matters concerning the sentence imposed as may be required by the Supreme Court.
>
> . . .
>
> (b) The Supreme Court of Idaho shall consider the punishment as well as any errors enumerated by the way of appeal.
>
> (c) With regard to the sentence the court shall determine:
>
> (1) *Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor,* and
>
> (2) *Whether the evidence supports the judge's finding of a statutory aggravating circumstance* from among those enumerated in section 19-2515, Idaho Code, and
>
> (3) *Whether the sentence of death is excessive or disproportionate* to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the state shall have the right to submit briefs within time provided by the court, and to present oral argument to the court.

(e) *The court shall include in its decision a reference to those similar cases which it took into consideration.* In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel.

(f) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

(g) The Supreme Court shall collect and preserve the records of all cases in which the penalty of death was imposed from and including the year 1975.

Idaho Code § 19-2827 (emphasis added).

The Idaho Supreme Court applied § 19-2827 to Creech, saying:

> We hold that none of these recent Idaho murder decisions militates toward the granting of leniency in the present case. We find no instance in which a defendant found guilty of such previous crimes as those of Thomas Creech has been found deserving of a sentence less than death. We have examined [thirty-four] cases dating back more than 50 years and our examination fails to disclose that any such remorseless, calculating, cold-blooded multiple murderer has (with the exception of Creech I *[State v. Creech*, 589 P.2d 114 (1979)] ever been before this Court. . . . We hold that the death penalty imposed in this case is both proportionate and just.

Creech, 670 P.2d at 476.

Creech had the death sentence imposed upon him by a judge not a jury.[3] *Creech*, 670 P.2d at 466 ("[f]ollowing the conclusion of the sentencing hearing, the district court made its written findings and pronounced sentence of death upon Creech"). In *Walton*, the United States Supreme Court held that "[w]hen a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process . . . [but t]rial judges are presumed to know the law and apply it in making their decisions." *Walton*, 110 S. Ct. at 3057. In the instant case, as recognized by footnote 12 of the panel's opinion, the sentencing judge is thus presumed to have applied the judicial refinements provided to him by *Osborn*.

Did the Idaho Supreme Court have *Osborn* in mind while it processed the case against Creech? The answer is yes. Justice Shepard, who wrote *Creech*, was on the *Osborn* panel. Moreover, the Idaho Supreme Court in *Creech* referred to *Osborn* and quoted *in haec verba* the limiting

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[3] Just as in *Walton*, this case is also distinguishable from *Maynard* because *Maynard* 'the defendant was sentenced by a jury and the jury either was instructed only in the bare terms of the relevant statute or in terms nearly as vague.' *Walton*, 110 S. Ct. at 3057.

passage from *Osborn* that I quote earlier in this opinion. *See id.*, at 471. Thus, the Idaho Supreme Court had in mind the *Osborn* standard when it said, "We now turn to whether the sentencing judge complied with those statutory provisions. . . . We have reviewed the record and hold that the evidence at the sentencing hearing clearly supports the trial court's findings of aggravating and mitigating circumstances." 670 P.2d 470.

Since 1972 in *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court has established certain minimum but strict requirements for states choosing to pursue capital punishment. Idaho has rigorously tailored its laws to meet these requirements. In my view, our court has strayed from the course charted by the Supreme Court in *Walton* and effectively established a standard for Idaho more exacting than the one established for Arizona. Hence, I DISSENT.